No. 80-1651

FILED
APR 29 1981
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES LEONARD AND WILLIAM SHARROCKS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners argue (Pet. 4-7) that they were prejudiced by a variance between the indictment and the proof at trial and that the district court erred in imposing sentence when it relied on petitioner Sharrocks' failure to cooperate with the government.

1. Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of conspiring to distribute controlled substances, in violation of 21 U.S.C. 846.

Petitioner Sharrocks was also convicted of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner Leonard was sentenced to five years' imprisonment on the conspiracy count. Petitioner Sharrocks was sentenced to consecutive terms of five years' imprisonment on the conspiracy count and five years' imprisonment on the substantive count. The district court also imposed cumulative fines of $10,000 and a five year special parole term on petitioner Sharrocks. The court of appeals affirmed without opinion (Pet. App. A).

2. The evidence at trial showed that petitioners were part of a drug smuggling ring that specialized in importing large quantities of marijuana and hashish into this country through international air carriers at Kennedy Airport in New York. Over the course of a nine-year period, the conspirators repeatedly followed a pattern of smuggling large shipments of drugs past U.S. customs officers by using contacts in the freight offices of various international airlines, including Alitalia, Braniff, Pan Am, Japan Air Lines, and Trans Mediterranean Airlines (see, *e.g.*, Tr. 263, 300-303, 2168, 2178, 3161-3175, 4001, 4024-4027, 4104, 4108-4111, 4208-4209). Petitioner Sharrocks was one of the leaders of the smuggling ring, particularly during the later years of its operation. Petitioner Leonard, who participated in the group's ventures from the early 1970's until 1979, served chiefly as an assistant to Sharrocks during the later years of the conspiracy (see Tr. 2259-2260, 2271-2273, 3993-3996, 4003-4004, 4170-4177; see also Tr. 380, 861, 2078, 3263).

3. Petitioners first claim (Pet. 4-7) that the evidence showed multiple conspiracies rather than the single conspiracy charged in count one of the indict-

ment. Although the multiple conspiracy issue was submitted to the jury, petitioners contend (Pet. 6) that the district court's supplemental instruction on this issue was "vague, misleading, and wholly failed to provide the jury with concrete guidelines" for determining the individual guilt of each alleged co-conspirator.

In fact, however, there was no variance at all between the charge in the indictment and the proof at trial. The proof established that, throughout virtually the entire period of the conspiracy, the core group of conspirators—including petitioners and five other men—followed a remarkably similar pattern in smuggling drugs into this country. They developed contacts at the freight offices of international airlines at Kennedy Airport. They then arranged for large shipments of drugs to be sent by air freight on board one of those airlines. The contact person at the airline would remove the package of drugs and manipulate the records so that the drugs would not have to pass through Customs. The conspirators would then distribute the drugs through a wholesale distributor —usually the same person. Thus, rather than showing multiple conspiracies, the evidence strongly supported the government's allegation that petitioners were part of a unified, and remarkably stable, conspiracy that involved repeated similar acts of drug smuggling over a number of years. This evidence fairly compelled the conclusion that the conspiracy charged in this case was "one general business venture." *United States* v. *Tramunti*, 513 F.2d 1087, 1106 (2d Cir.), cert denied, 423 U.S. 832 (1975).

Nor was the district court's charge erroneous. The court gave an initial charge on multiple conspiracies (Tr. 7588-7592) that petitioners conceded below

(C.A. Br. 28) was correct. The court thereafter twice responded to questions from the jury by repeating its entire charge on conspiracy. See Tr. 7625-7641, 7692-7707. The repeated instructions included the full text of the court's charge on multiple conspiracies. See Tr. 7633-7636, 7703-7706.

The jury then asked a question regarding multiple conspiracies (Tr. 7827):

> * * * assuming multiple conspiracies are found, we need clarification as to the standard to be used in identifying one of the multiple conspiracies as the conspiracy charged in count one.
>
> * * * Following the same assumption, we also need enlightenment as to the relationship then existing between the conspiracy identified as Count one and the remaining multiple conspiracies.

In response to this question, the court gave the supplemental instruction that is quoted at pages 4-6 n.* of the petition. In essence, the supplemental instruction advised the jury that, in order to find any defendant guilty, the jury must find that the conspiracy described in count one of the indictment existed and that the individual defendant knowingly participated in that conspiracy. The court further instructed that, if the jury found that the evidence did not establish the conspiracy alleged in count one, or if it concluded that any defendant was not a knowing participant in that conspiracy, it should acquit that defendant. The court added that, if a defendant was involved solely in a separate conspiracy, he must be acquitted.

This charge correctly stated the law and accurately answered the jury's question. The jury was correctly told that it could convict any defendant if it found

multiple conspiracies, but *only* if (a) it found that one of the conspiracies was the same as that charged in the indictment (*i.e.*, a conspiracy having as its objects one or more of the objects listed in the indictment) and (b) it found that the defendant knowingly participated in that conspiracy. See *United States* v. *Tramunti, supra,* 513 F.2d at 1107; *United States* v. *Cambindo Valencia,* 609 F.2d 603, 622-625 (2d Cir. 1979).

The only specific complaint that petitioners make about the supplemental charge is that it failed to give the jury guidance as to "the individual accountability of a particular defendant with regard to the conspiracy charged" (Pet. 6). In fact, however, the court specifically advised the jury that its task was to determine whether "any of the defendants * * * were knowing participants" in the charged conspiracy (Tr. 7829). If the evidence did not establish that proposition beyond a reasonable doubt as to a particular defendant, the court charged that the defendant must be acquitted (Tr. 7829-7830). In the passage quoted by petitioner, as well as elsewhere in its instructions, the court repeatedly referred to the jury's obligation to examine the guilt of each defendant separately. The supplemental instruction therefore was not erroneous.

4. Petitioner Sharrocks contends (Pet. 7) that the district court improperly penalized him for his failure to cooperate with the government. The short answer to petitioner's claim is that, as a reading of the sentencing transcript makes clear, petitioner's failure to cooperate was not a factor in the district court's sentencing decision.

The district court clearly explained its reasons for the sentence it imposed. The court was convinced that

petitioner was a "major figure in this conspiracy," that his participation continued over at least a five-year period of time, and that the use of petitioner's contacts at JFK airport from his prior employment was "a rather essential part of the success that this wide-ranging importation conspiracy had" (C.A. App. 752-753).[1] The district judge further referred to the seriousness of drug smuggling (C.A. App. 753). Finally, he noted that rehabilitation was not a realistic prospect, and that therefore "the punishment must fit the crime" (C.A. App. 754).[2]

At no time in the course of outlining his reasons for the sentence did the district judge mention petitioner's non-cooperation.[3] Nor is it reasonable to infer that non-cooperation was a factor in his decision simply because the maximum sentence was imposed. For the judge also sentenced petitioner Leonard to the maximum term allowable for the same crimes, and there was no suggestion in Leonard's case that non-cooperation was taken into account in fixing his sentence (C.A. App. 725).

Petitioner bases his contrary view on a brief colloquy between defense counsel and the court during

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[1] "C.A. App." refers to the joint appendix in the court of appeals.

[2] The judge added that he had conferred with other judges in the district about the sentence pursuant to the "panel sentencing" practice in the Eastern District of New York (C.A. App. 754).

[3] Compare *Roberts* v. *United States*, 445 U.S. 552 (1980) (explicit reliance by sentencing judge on defendant's lack of cooperation); *United States* v. *Tucker*, 404 U.S. 443, 444 & n.1 (1972) (explicit reliance by sentencing judge on prior convictions that were later invalidated).

the sentencing hearing. When counsel asserted categorically that petitioner's lack of cooperation could not be taken into account in sentencing, the district court, referring to *Roberts* v. *United States*, 445 U.S. 552 (1980), stated that "the Supreme Court has recently ruled otherwise" (C.A. App. 739). Defense counsel then addressed the *Roberts* decision and distinguished it on the ground that petitioner, unlike Roberts, had timely invoked his Fifth Amendment privilege as the basis for refusing to cooperate (C.A. App. 739).[4] The district court did not disagree with counsel or suggest that non-cooperation should be considered as a relevant factor in imposing sentence in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[4] In *Roberts*, the defendant had not timely asserted his Fifth Amendment privilege, and the Court reserved decision on the question whether non-cooperation could be considered if it were the product of a timely assertion of the privilege. See 445 U.S. at 559.

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